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IN THE

Supreme Court of the United States

October Term, 1952

No._____

AMERICAN FIRE AND CASUALTY COMPANY, *Petitioner*,

v.

FLORENCE C. FINN, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals For the Fifth Circuit

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered on September 17, 1953, (R-97) reversing Judgment of the District Court (R-68) and ordering the Trial Court to reinstate the Judgment that previously had been reversed by this Court. AMERICAN FIRE AND CASUALTY COMPANY v. FINN, 341 U.S. 6.

Opinions Below

After the 1949 Judgment in favor of Respondent was reversed by this Court with directions to the Trial Court,

Chief Judge Kennerly of the Southern District of Texas wrote an unpublished memorandum carrying out the directions and mandate of this Court (R-36).[1]

The second trial was presided over by Judge Ben C. Connally of the Southern District of Texas, who, because of two Jury findings of wilful misrepresentations on the part of Respondent (R-56 and 57), wrote an unpublished memorandum dated February 19, 1952 (R-58). The first opinion by the Court of Appeals, Fifth Circuit, was written by Judge Holmes and is reported at 181 F. 2d 845, but this holding was reversed by this Court at 341 U.S. 6. Even though he had been previously reversed, Judge Holmes, joined by Judge Rives, wrote the majority opinion on the second appeal, which is reported at 207 F. 2d 113. Judge Strum filed an extended dissenting opinion.

Jurisdiction

The Judgment of the Court of Appeals was entered September 17, 1953. Petitioner's Motion for Rehearing was denied on October 19, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

Urged as Reasons for Granting Petition

1. In reversing the District Court, whether the Court of Appeals for the Fifth Circuit has refused to follow, as the law of the case, the opinion, judgment and mandate of this Court rendered on previous appeal, in which "the District Court" was directed to proceed with the litigation in accordance with the procedures set out in two expressly

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[1] The original 1949 trial was held by Judge Ben H. Rice of the Western District of Texas, who was sitting by designation in the Southern District of Texas.

cited case decisions, which were followed verbatim by the District Court.[2]

2. Whether the Trial Court, in a case where Federal removal jurisdiction based upon diversity of citizenship and 28 U.S.C. 1441(c), has failed upon appeal:

a. is compelled, without discretion, to grant Plaintiff's motion for retroactive dismissal of the resident defendant whose presence in the suit was found to destroy Federal jurisdiction, or

b. may the Trial Court, as a matter of discretion, either refuse to grant such motion for dismissal at all or grant such motion instanter without retroactive effect.

3. In a case where Federal removal jurisdiction based upon diversity of citizenship and 28 U.S.C. 1441(c) has failed upon appeal because of the presence in the litigation of a resident defendant, whether the Trial Court's action in ordering instanter dismissal of such resident defendant, as distinguished from retroactive dismissal, and the amendment and recasting of pleadings, as well as a new trial on such pleadings, may be reversed and rendered for such action by a Court of Appeals on the ground that:

a. the Trial Court committed reversible error of law in considering that he had no jurisdiction to do anything other than grant a new trial if the Court previously trying the case completely lacked jurisdiction, or

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[2] The two decisions referred to are **Dollar SS Lines v. Merz** (CA 9th, Cal.), 68 F. 2d 594, and **International Ladies' Garment Workers Union v. Donnolly Garment Co.** (CA 8th, Mo.), 121 F. 2d 561. See also opinion of this Court on prior appeal, 341 U.S. 18, footnote 18.

b. if the Trial Court exercised a judicial discretion in granting a new trial, reversible error was committed simply because the Court of Appeals, disagreeing with the result reached by the District Court, could substitute its discretion for that of the District Court rather than examining the District Court's action with an eye toward determining whether the discretion inherent in District Court had been abused.

4. Whether the Court of Appeals, upon its finding that the Trial Court, through a mistake of law, has failed to exercise a judicial discretion inherent in the District Court, may substitute its discretion for that of the District Court without first giving that Court the opportunity to pass upon the matter as one of discretion.[3]

To be Urged if Petition for Certiorari is Granted

5. Whether Fact Findings by a Jury, convicting Respondent of making wilfully false representations before and after loss, do not make un-enforceable the insurance contract written on the Texas Standard Fire Insurance Form, promulgated by proper State Authority under legislative enactment.

Statute Involved

28 U.S.C. 1441(c)

"Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may

[3] This question involved is of rather an alternative nature, as Petitioner will demonstrate to the Court that the District Court, in passing upon this matter of new trial, actually exercised a judicial discretion, despite the statements of the majority opinion of the Court of Appeals to the contrary.

be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

Statement

As originally brought, this suit was one of a civil nature seeking to recover the proceeds of an insurance contract which was alleged to be either oral or written. It was filed by Respondent, Florence C. Finn, a citizen of Texas, against Petitioner, American Fire and Casualty Company, a corporate citizen of the State of Florida; Indiana Lumbermen's Mutual Insurance Company, a corporate citizen of the State of Indiana; and Joe Reiss, a citizen of the State of Texas. It was first filed in the State District Court for Harris County, Texas (R-4). The suit was removed by the two corporate defendants to the District Court of the United States for the Southern District of Texas, Houston Division (R-13), where a trial upon the merits resulted in a judgment in favor of Respondent against only Petitioner, American Fire and Casualty Company, in the amount of Five Thousand ($5,000.00) Dollars (R-24). This Judgment was affirmed by the Court of Appeals for the Fifth Circuit. Petition for Certiorari was granted by this Court, which reversed the two lower Courts. The opinion of this Court stated in part as follows:

> "The judgment of the Court of Appeals must be reversed and the cause remanded to the District Court with directions to vacate the judgment entered and, if no further steps are taken by any party, to affect its jurisdiction, to remand the case to the District Court of Harris County, Texas * * *." (341 U.S. 18).

To this statement of the Court was appended a footnote which reads as follows:

> "Issues not raised in the records or briefs are not passed upon, such as the propriety of the District Court's allowing, after vacation of judgment, a motion to dismiss Reiss, the resident defendant; or the associated problem; whether, if such a dismissal is allowed, a new judgment can be entered on the old verdict without a new trial. These questions and like matters are for the consideration and decision of the District Court. See e.g. Dollar SS Lines vs. Merz (C.A. 9th Cal.); 68 F. 2d 594; International Ladies' Garment Workers Union vs. Donnolly Garment Co. (C.A. 8th Mo.) 121 F. 2d 561." (341 U.S. 18).

The mandate of this Court directed to the District Court of the United States for the Southern District of Texas contains essentially the same language as quoted from the opinion above (R-33-35).

In compliance with the mandate of this Court, Chief Judge Kennerly, on May 17, 1951, entered an order vacating the Judgment previously rendered (R-35), such order allowing any party to the suit to take whatever steps deemed necessary to affect jurisdiction. Respondent then moved that Joe Reiss be dismissed as a party-defendant, such dismissal to be retroactively effective as of the original filing of the suit, and requesting after such retroactive dismissal, the Judgment in the amount of Five Thousand ($5,000.00) Dollars should be reinstated on the verdict of the Jury that was part of the proceeding which this Court reversed (R-36).[4]

After considering written briefs and oral arguments, Chief Judge Kennerly directed that Joe Reiss, the resident defendant, be dismissed from the suit as of the date of the order which was June 5, 1951, but not retroactively as of

[4] This motion is not part of the printed record; however, it is extensively quoted from in the Trial Court's memorandum opinion on pages 38 and 39 of the record.

the inception of the suit as requested by Respondent (R-42). Also, the Court denied Plaintiff's motion for reinstatement of the Judgment rendered on the verdict of August 4, 1949, directed that Respondent replead her case by June 15, 1951, and that Petitioner answer such new pleading by July 1, 1951, and in conclusion, ordered a new trial on the issues made by the amended pleadings (R-42). The parties complied with the Court's directions concerning amended pleadings (R-33-53), and the case proceeded to a second trial during the latter part of January, 1952 (R-54).[5]

Even though the Jury's verdict convicted Respondent of wilfully false representations both before and after loss (R-54-57), the Trial Judge, Ben C. Connally, after writing an extended memorandum opinion on the subject (R-58-68), entered a Judgment awarding a recovery in favor of Florence C. Finn in the amount of One Thousand Eight Hundred Fifty ($1,850.00) Dollars, in contrast to the Judgment of Five Thousand ($5,000.00) Dollars rendered on the 1949 verdict of the Jury. Appeal from the Court's Judgment, rendered by Judge Ben C. Connally, and from the order of Judge Kennerly entered after the issuance of the mandate of this Court (R-41-42), was perfected by Respondent. Petitioner also cross-appealed contending that the Fact Findings of false representation by the Jury required the entry of Judgment that Respondent take nothing by her suit (R-75).

This second appeal resulted in the Judgment by a divided Court, previously mentioned, the material parts of which will appear under "Reasons for Granting the Writ".

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[5] Respondent's amended complaint named only Petitioner as Defendant. Indiana Lumbermen's Mutual Insurance Company and Joe Reiss were no longer parties to the case; therefore, the second trial was not infected with the charges of fraud, breach of confidence, and other personal charges of bad faith against Reiss. Compare R-10-12 with R-43-46.

Reasons for Granting the Writ:

I.

Without doubt, this Court, upon the prior appeal of this case, held that the District Court originally trying the case completely lacked jurisdiction. The highlight of this Court's opinion on the merits of the case is as follows:

> "To permit a Federal Trial Court to enter a judgment in a case removed without right from a State Court where the Federal Court could not have had original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of Federal jurisdiction and give District Courts the power the Congress has denied them." 341 U.S. 18.

Obviously, the majority opinion of the Court of Appeals for the Fifth Circuit upon the second appeal of this case refuses to accept the holding that the Trial Court was completely without jurisdiction, but continues, in the face of the above language by this Court, to make an erroneous construction of the law applicable.[6]

That the Court of Appeals is approaching this case with a wrong concept of the Trial Court's jurisdiction at the first trial is made clear by the fact that it uses almost the same language of the dissenting opinion upon this case's former

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[6] The Court of Appeals said: "The Trial Court thought that, prior to the amendment, it had been wholly without jurisdiction; and, assigning that ground alone, it set aside the proceedings in the former trial conducted on August 3 and 4, 1949, and granted a new trial. This holding was based we think upon a misconception of the law. * * * " (R-92).

"The only reason that the Judge, who granted the new trial after the remand of the case, assigned for setting aside the first verdict was that the Federal Court was wholly without jurisdiction when it was rendered. Prior to the amendment, Federal jurisdiction was imperfect or defective, but it was not wholly lacking." (R-93).

appearance in this Court where a minority of the Court was of the opinion that there was only an "irregularity" in jurisdiction. Of course, the majority rejected this concept.

This Court in its former opinion expressly granted to the "District Court" the right to decide whether a dismissal as to the resident defendants, whose presence in the lawsuit had defeated jurisdiction, would be allowed at all and if so, whether such dismissal would be allowed retroactive effect to pave the way for the former judgment to be reinstated. Motions for leave to amend and motions for dismissal of parties whose presence defeat jurisdiction traditionally have been held to be within the sole province of the District Court. DENNY v. PIRONI AND SLATRI, 141 U.S. 121. INTERNATIONAL LADIES' GARMENT WORKERS UNION v. DONNOLLY GARMENT COMPANY (C.A. 8th Mo.), 121 F. 2d 561.

The Trial Court, by its Order dated June 5, 1951, allowed the dismissal of the resident defendant as of the day the Order was entered and not retroactively to the inception of the suit.[7] The Court of Appeals cannot change, by its Judgment, this Order of the District Court because the District Court's right to decide whether Reiss may be dismissed at all is given to it by the opinion of this Court on prior appeal. Thus, without a finding that the entry of such Order was an abuse of discretion, the directions of this Court stand as the law of the case. In approaching this matter, the Appellate Courts must accept the record as made in the Trial Court, and clearly under that record, the District Court completely lacked jurisdiction to hold the former trial because under the record as it still appears, Reiss was a

[7] (R-42) "The cause of action * * * against Joe Reiss * * * is dismissed and the said Joe Reiss and the Joe Reiss Insurance Agency are **no longer** parties to this controversy". (Emphasis added)

party to the case at the first trial. The Trial Court's Order did not cure jurisdictional defects that were in the case from the date of its filing in August, 1948 to June 5, 1951, but did cure jurisdictional defects in the case from June 5, 1951, until the present time. Accordingly, on the record before it, leaving aside the problem of whether a new trial should be granted, the Court of Appeals is in the position of reversing a District Court who has carried out explicitly the mandate and opinion of this Court given on prior appeal. Surely this calls for an exercise of this Court's power of supervision to compel lower Courts to comply with its decisions.

In this Court's opinion upon the former appeal, it defined the way for the Trial Court, with respect to the grant of new trial, by citing to it two cases that it should follow, namely: DOLLAR SS LINES v. MERZ (C.A. 9th, Cal.), 68 F. 2d 594, and INTERNATIONAL LADIES' GARMENT WORKERS UNION v. DONNOLLY GARMENT COMPANY (C.A. 8th, Mo.), 121 F. 2d 561.

Just as Judge Strum, dissenting, eloquently points out, the District Court followed the exact procedure that was done in these cases but was reversed for doing so. In fact, the District Judge used similar language to that used in the DOLLAR case in his memorandum directing the entry of the Order of June 5, 1951.[8]

Judge Strum exposes the fallacy of Judge Holmes' opinion by first quoting the language appearing in footnote 8 from the DOLLAR case and then points out that:

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[8] The Dollar decision at 68 F. 2d 597 says: " * * * the majority of the Court are of the opinion that a new trial must be granted, inasmuch as the District Court completely lacked jurisdiction to hold the former trial." The District Court's Order says: "All proceedings in the former trial of this civil action conducted in this Court on August 3 and 4, 1949, are set aside and held for naught as the Court conducting such trial was wholly without jurisdiction."

"The District Judge here granted a new trial for precisely the same reason. Yet the majority, while citing the Dollar case with approval, reverses the District Judge for so doing." (R-99)

The other case cited by this Court as a guide to the District Court in determining whether a dismissal should be allowed, and if so, whether it would be of a retroactive nature and whether the old verdict would support a new judgment without a new trial, is the DONNOLLY case, supra. The Court of Appeals' decision in this case did nothing more than remand the case because of a finding of no jurisdiction, but granted the Plaintiff the right to apply to the District Court for an amendment to show jurisdiction. The Trial Court, in an opinion reported at 47 F. Supp. 64, recognized the DOLLAR case as controlling, but observed that if he had a discretion in the matter, he would allow the amendment but grant a new trial.

The two guides furnished by this Court to the District Judge were meticulously followed by him, yet the Court of Appeals undertakes to thwart the holding of this Court and Order of the District Court entered in compliance therewith by decreeing the reinstatement of the judgment previously reversed by this Court. Clearly, this calls for an application of the supervisory powers of this Court to correct a gross departure from "the accepted and usual course of judicial proceedings", as is provided in Supreme Court Rule 38(5)(b).[9]

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[9] See also **Continental Insurance Company v. United States**, 259 U.S. 156 (166) where this Court stated: " * * * but in this case, as the decree which is before us was entered under a mandate of this Court, we have jurisdiction to consider on our own motion whether our mandate was complied with. **We delegated to the District Court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal**, and that gives us plenary

Petitioner submits that the Court of Appeals has prevented the District Court from carrying out the opinion, instructions and mandate of this Court on prior appeal, thereby, placing this Petition for Certiorari within that type of case where Certiorari should be granted, the Court at the same time summarily reversing and vacating the judgment of the Court of Appeals. SECURITY AND EXCHANGE COMMISSION v. OTIS AND COMPANY, 338 U.S. 843.

II.

A. The decision of the Court of Appeals is in direct conflict with the holding of the majority of the Court in DOLLAR SS LINES v. MERZ (C.A. 9th, Cal.), 68 F. 2d 594, and ATCHISON T. & S.F. RY. COMPANY, ET AL., v. FRANCOM, ET AL. (C.A. 9th, Cal.), 118 F. 2d 712. The majority opinion below holds that the District Court, after Federal removal jurisdiction has failed upon appeal and a motion to dismiss the party to the suit whose presence defeated jurisdiction, *must* grant the motion to dismiss as of the inception of the lawsuit and must enter a new judgment upon the old verdict as if the jurisdictional impediment had not been present, and that if such is not done by the Trial Judge, the Court of Appeals will change the record as made below by allowing the dismissal retroactively, and direct the reinstatement of the former judgment. The DOLLAR case, as has been previously pointed out, held:

> " * * * that a new trial *must* be granted, inasmuch as the District Court completely lacked jurisdiction to hold the former trial." (Emphasis added).

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power where the compliance has been attempted and the decree, in a proper way, is brought to our attention, to say that it follows our opinion." (Emphasis added).

No clearer conflict in decision on cases presenting almost identical fact situations can be demonstrated.

In the FRANCOM case, supra, removal jurisdiction based upon the claim of separable controversy failed upon appeal and the case was remanded to the District Court with instructions to remand to the State Court "unless the Appellees, Plaintiffs below, dismiss the cause as to the defendants below who are citizens of California". The Court then held that if such dismissal was granted, a new trial should be had.[10]

B. The Court of Appeals' holding that the dismissal of the resident defendant Reiss must be given retroactive effect to the inception of the suit is more than in theoretical conflict with the decision of YOUNG v. GARRETT (8th Cir. Ark.), 159 F. 2d 634. In this case, at the original trial defendants

[10] For a slightly different view, see **Levering and Garrigues Company v. Morrin**, 61 F. 2d 115, affirmed 289 U.S. 103, without discussion of the problem there presented, where on page 121 the Court of Appeals holds that the Plaintiffs are granted leave to amend by either dismissing the local defendants or by inserting appropriate allegations to show that none of the Plaintiffs were residents of the same states as defendants and observed merely as obiter dicta that " * * * there is authority allowing the record to stand as already taken and to enter a decree thereon against the individuals, provided it appears that all evidence remains equally admissible with the dismissed defendants out. * * * This is a matter for the District Court to determine. * * * " The contention was made by Petitioner to the Trial Court prior to the entry of the Court's Order of June 5, 1951, that the presence of Reiss in the lawsuit was prejudicial to Petitioner because his dismissal from the lawsuit did away with all of the inflammatory allegations concerning his fraud, breach of confidence, villainous character and wrongful acts. That the Trial Court in part based his decision upon this contention, thereby exercising his judicial discretion, if any he had, in the matter, is made clear by his citing as authority the Morrin case in support of his Order of June 5, 1951 (R-40). So, just as did the Trial Court in the Donnolly case, 47 F. Supp. 64, Chief Judge Kennerly considered himself bound by the Dollar case, but if he had a discretion in the matter, he would apply the theory of the Morrin case.

raised the objection to jurisdiction that certain indispensible parties were not made defendants and that their presence as defendants would defeat jurisdiction. The Trial Court dismissed the case, from which Order plaintiffs appealed. The Court of Appeals rendered its first opinion reported in 149 F. 2d 223, and on Petition for Rehearing, the former opinion was modified, giving plaintiffs the right to apply to the District Court for leave to amend their complaint in an effort to show jurisdiction. The District Court refused in toto their right to show jurisdiction. From this action of the Court, plaintiffs again appealed and upon the second appeal, the Circuit Court held that the District Court, in the exercise of its judicial discretion, could completely deny such right to amend and that in the case before it an abuse of that judicial discretion was not shown. There has been no accusation that Chief Judge Kennerly abused his discretion in the case at bar.

In the instant case, the Court of Appeals held that the Order dismissing Reiss must have retroactive effect even though the Court's Order dismissed him as of June 5, 1951, rather than as of the inception of the lawsuit. Surely if the Court has the right to refuse amendments seeking to show jurisdiction in toto, it has the right to allow such amendments as of date ssubsequent to the inception of the lawsuit.

C. There is also direct conflict between the holding of the Court of Appeals in the instant case and the decisions in DENNY v. PIRONI AND SLATRI, 140 U.S. 121; INTERNATIONAL LADIES' GARMENT WORKERS UNION v. DONNOLLY GARMENT COMPANY (C.A. 8th Mo.), 121 F. 2d 561; and LEVERING AND GARRIGUES COMPANY v. MORRIN, 61 F. 2d 115, by Judge Holmes' statement that the Court of Appeals can allow at its discretion the motion to dismiss or leave to amend, giving the reason that the Court of Ap-

peals is in as good a position to exercise discretion as is the District Court. Each of the three cases above cited holds unequivocally that these matters are within the discretion of the Trial Court, and that there is no power in the Appellate Courts to grant such motions to dismiss or leave to amend.

The DENNY case says:

> "A case cannot be amended here so as to show jurisdiction but the Court below, in its discretion, may allow it to be done where the suit was instituted in the Circuit Court." [11]

In the case at bar the Court of Appeals for the Fifth Circuit is not consistent with its prior decisions. In FOREMAN v. MESIROW, 167 F. 2d 711, the Court, upon a finding that jurisdiction failed because of lack of diversity of citizenship, reversed the case with directions to the District Court to dismiss for want of jurisdiction. On rehearing, the Court modified its opinion in this manner:

> "Unless within thirty days from the filing in the District Court of the mandate of this court such amendment of the complaint is offered as will make

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[11] See also **Continental Insurance Company v. Rhoads**, 119 U.S. 237 and **Halsted v. Buster**, 119 U.S. 341. The last cited case stating: "If the citizenship of the defendant was, in fact, such at the commencement of the suit as to give the Circuit Court jurisdiction, it will be in the power of that Court when the case gets back, to allow the necessary amendment to be made and **then proceed to trial.**" (Emphasis added).

Note also the decisions of **Thomas v. Anderson** (CCA 8th), 223 F. 41; **Watson v. Bonfils** (CCA 8th), 116 F. 157; **Danks v. Gordon** (CCA 2nd), 272 F. 821; **Matthews v. Coppin** (CCA 9th), 32 F. 2d 100; **Carpenter v. Carden**, 294 F. 515; and **Devost v. Twin States G & E Company** (CCA 1st), 250 F. 349. In the last four cases cited, the Appellate Court dismissed in toto without granting leave for plaintiffs to amend in the Trial Court.

it one within the jursdiction of the Court; *and if such amendment is allowed to take further proceedings as may then be proper.*" (Emphasis added).

It is with great significance that Judges Sibly, Waller and Lee of the Fifth Circuit cited to the District Court for its guidance, just as this Court did to the District Court upon the prior appeal of this case, the decisions in INTERNATIONAL LADIES' GARMENT WORKERS UNION v. DONNOLLY GARMENT COMPANY (C.A. 8th Mo.), 121 F. 2d 561, and DOLLAR SS LINES v. MERZ (9th Cir.), 68 F. 2d 594.

D. If not in direct conflict, certainly there is a conflict in principle in the holding of the Court of Appeals in the instant case that when a District Court is vested with a judicial discretion, and, through mistake of law, fails to exercise that discretion, the Appellate Court can then exercise the discretion that should have been exercised by the District Court, with MONTGOMERY WARD & COMPANY v. DUNCAN, 311 U.S. 243. Here it was held that the District Court's grant of judgment non obstante veredicto, which was joined with a motion for new trial, was error but the Supreme Court could not act upon the motion for new trial, substituting its discretion for that of the Trial Court. The only thing the Supreme Court could do was to remand the case to the District Court for an exercise of the judicial discretion inherent in it. The only function of an Appellate Court in matters where the law vests an inherent judicial discretion in the District Court is, after such discretion is exercised, to review the District Court's actions with the idea of determining whether there has been an abuse of such discretion. In no case can the Appellate Court exercise that discretion *de novo*.

This holding of the Court also violates in principle the decision of FELTON v. SPIRO (6th Cir.), 78 F. 576, where it was held:

> "It only remands the cause for further proceedings from the point where the error was committed. We found no error in the action of the court upon the trial and before verdict, and hence we shall not disturb it, but shall leave it to the trial court, upon consideration of the weight of the evidence, to grant the motion for new trial, or not, as in its discretion it may deem proper."

The Court of Appeals for the Fifth Circuit has difficulty in maintaining consistency in its own ranks because despite Judge Holmes' statements to the contrary in the instant case, a panel of Judges composed of Chief Judge Hutchinson, Judge Sibly and Judge Waller, stated in MARSH v. ILLINOIS CENTRAL RY. COMPANY, 175 F. 2d 498, the following:

> "The full discretion vested in the trial judge not having been exercised, we will remand the case with direction to the judge to grant a new trial instead of a judgment notwithstanding the verdict, if he continues to think the verdict to be against the overwhelming weight of the evidence."

Petitioner has contended throughout this proceeding that Judge Kennerly did, in fact, exercise his judicial discretion in entering the Order of June 5, 1951; however, if he did not do so, the only thing that the Court of Appeals or any other Appellate Court can do with the case is remand it to the District Court for an exercise of the judicial power inherent in it.[12]

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[12] All proceedings in this case from the date of its filing in August, 1948, until its actual trial in August, 1949, were conducted by Chief Judge Kennerly of the Southern District of Texas, Judge Ben H. Rice, of the Western District of Texas, actually tried the case, sitting by designation in the Southern District of Texas in aid of a crowded docket. When the case was remanded by this

The conflicting character of the instant case decision, with the cases cited above, inevitably will keep the decisions of the District Court and other Courts of Appeals in a state of argumentative discord until this question, which was reserved to some extent but with the path clearly lighted from this Court's holding on the prior appeal of this case, is resolved by this Court.

III.

Clearly, the questions presented here are of extreme importance to orderly administration of Federal jurisdictional issues. The compliance by inferior Courts with the opinions, judgments and mandates of this Court affects the heart of our Judicial System. If the instructions of the highest Court are to be ignored by Courts of Appeals and ways sought by such Courts of Appeals to reinstate their former judgments that stand reversed by this Court, orderly administration of justice will fail.

Apparently this Court has never written a definitive opinion concerning what disposition a District Court shall make of a case when it is remanded to it, when jurisdiction fails upon appeal. Certain phases of this problem have been

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Court in May, 1951, Judge Ben H. Rice was no longer sitting by designation in the Southern District of Texas; therefore, Chief Judge Kennerly of the Southern District took the case over and complied with this Court's mandate. Surely Judge Kennerly was within the power granted him by Rule 63, Federal Rules of Civil Procedure, which governs this and like matters:

"If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; **but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.**" (Emphasis added).

touched upon by this Court before but now comes the opportunity to spell out with certainty the courses of action that are open to the District Court in cases of this kind, and to state what right of review over these acts the Courts of Appeals has. Traditionally, matters of jurisdiction, especially removal jurisdiction, have been of sufficient importance for this Court to decide. No case, either by this Court or by a Court of Appeals, since the recodification of the Judicial Code effective September 1, 1948, touching the matter has been found.

IV.

It is believed that the decision of the Court below is clearly erroneous under the existing case decisions on the subject. The holdings of the various cases which directly conflict or conflict in principle with the holding of the Court of Appeals in the case at bar, have been discussed previously and will not be repeated here. It is believed that should this Court accept this case for a hearing upon the merits, its decision would conform to the many case decisions with which the Court of Appeals' holding conflicts. The erroneous nature of the decision is pointed out by Judge Strum with more eloquence than Petitioner can command in this language:

> "In my opinion, the District Judge neither erred nor abused his discretion but acted soundly and justly in ordering a new trial. The parties, by the amendment, were commencing virtually a new suit between only two of the former parties. The District Judge thought that these parties should have a trial de novo on the new controversy, and upon the altered issues, which I think was a sound view of the matter. Nothing could be more logical or just." (R-99).

And again as to legal support of the majority's opinion, Judge Strum observes:

"The books will be searched in vain for a case which supports the majority holding, particularly one in which, as here, the change made in the parties also works a material change in the cause of action asserted by plaintiff."

Conclusion

For the foregoing reasons, Petitioner prays that this Petition for Certiorari be granted and that the judgment of the Court of Appeals be summarily reversed upon the ground that it has prevented the carrying out by the District Court of the opinion, judgment and mandate rendered by this Court on former appeal; or in the alternative, that this Petition for Certiorari be granted and that the case be set for submission on its merits to the end that Petitioner may submit the issues raised herein, and by its cross-appeal which was ignored by the Court of Appeals.

Respectfully submitted,

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